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## SUNGAI DINAR SDN BHD v. KOPERASI PEKEBUN KECIL WILAYAH JOHOR SELATAN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B MARY LIM JCA
[CIVIL APPEAL NO: J-02(IM)(NCVC)-1185-07-2015]
22 JULY 2016

C ***CIVIL PROCEDURE:*** *Res Judicata – Issues, similarity of – Whether cause of action in present suit same as first suit – Whether issues had been adjudicated and decided on merits in first suit – Plaintiff chose not to appeal against decision in first suit – Whether estopped from litigating same issues – Whether present action barred by res judicata*

D The appellant ('the defendant') filed a notice of application to strike out the respondent's ('the plaintiff') writ of summons and statement of claim pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012. The application was premised principally on the defendant's contention that the same issues and claims had already been adjudicated by the High Court *vide* the Originating Summons No. 24-2896-2008 ('OS') which consequently led E to the said OS being struck out ('the first suit'). There was no appeal filed by the plaintiff and therefore, the plaintiff's present action was barred by *res judicata*. The High Court dismissed the notice of application. Hence, this appeal wherein the sole issue for determination was whether the action was barred by *res judicata.*

F **Held (allowing appeal)**
**Per Idrus Harun JCA delivering the judgment of the court:**

**(1)** It was clear that the causes of action in the first suit and the instant action were the same, wherein both suits sought two identical reliefs resting on G the same facts and issues. The main bone of contention in the first suit was whether the defendants were recognised as 'Malay' under the Johore Malay Reservation Enactment 1936. The plaintiff raised the same issue which had already been adjudicated and decided in the first suit of which the plaintiff chose not to appeal. It was clear that both cases boiled down to the issue of the status of the defendant and the High Court in the first H suit had already made a decision. (paras 11 & 12)

**(2)** A matter that has been adjudicated by a competent court ought not to be pursued further by the same parties. The matter had already been decided on the merits by the competent court and accordingly, it was I conclusive between the defendant and the plaintiff as to all matters that were already litigated or that could have been litigated in the first suit. *Res judicata* therefore applied to the present action as to estop the

plaintiff from litigating the same issue. The defendant, being the party asserting *res judicata* had shown that there was a final judgment on the merits and that it was conclusive as the plaintiff did not file any appeal against the High Court's decision. Therefore, the plaintiff ought not to be allowed to file the second suit. (para 14)

***Bahasa Malaysia*** *Headnotes*

Perayu ('defendan') memfailkan notis permohonan untuk membatalkan writ saman dan penyataan tuntutan responden ('plaintif') menurut A. 18 k. 19(1)(b), (c) dan (d) Kaedah-kaedah Mahkamah 2012. Permohonan tersebut pada dasarnya berasaskan hujahan defendan bahawa isu-isu dan tuntutan-tuntutan yang sama telah diputuskan oleh Mahkamah Tinggi melalui Saman Pemula No. 24-2896-2008 ('OS') yang kemudiannya menjurus kepada OS tersebut dibatalkan ('guaman pertama'). Tiada rayuan difailkan oleh plaintif dan dengan itu, tindakan plaintif ini terbatas oleh *res judicata*. Mahkamah Tinggi menolak notis permohonan tersebut. Dengan itu, rayuan ini di mana satu-satunya isu yang perlu diputuskan adalah sama ada tindakan tersebut terbatas oleh *res judicata*.

**Diputuskan (membenarkan rayuan)**
**Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:**

**(1)** Adalah jelas bahawa kausa tindakan dalam guaman pertama dan tindakan ini adalah sama, di mana kedua-dua guaman memohon relief-relief yang serupa atas fakta-fakta dan isu-isu yang sama. Asas utama hujahan dalam guaman pertama adalah sama ada defendan-defendan diiktiraf sebagai 'Melayu' di bawah Enakmen Rizab Melayu Johor 1936. Plaintif membangkitkan isu yang sama yang telah dihakimi dan diputuskan dalam guaman pertama yang mana plaintif memilih untuk tidak merayu. Jelas bahawa kedua-dua kes menjurus kepada isu kedudukan defendan dan Mahkamah Tinggi dalam guaman pertama telah membuat satu keputusan.

**(2)** Perkara yang telah dihakimi oleh mahkamah yang kompeten tidak wajar diteruskan lanjut oleh pihak-pihak yang sama. Perkara tersebut telah diputuskan atas merit oleh mahkamah yang kompeten dan dengan itu, adalah muktamad antara defendan dan plaintif terhadap kesemua perkara yang telah dilitigasikan atau yang mungkin boleh dilitigasikan dalam guaman pertama. Oleh itu, *res judicata* terpakai dalam tindakan ini untuk mengestop plaintif daripada melitigasi perkara yang sama. Defendan, sebagai pihak yang membangkitkan *res judicata*, telah menunjukkan bahawa terdapat penghakiman terakhir yang bermerit dan bahawa ia adalah muktamad kerana plaintif tidak memfailkan apa-apa rayuan terhadap keputusan Mahkamah Tinggi. Oleh itu, plaintif tidak wajar dibenarkan memfailkan guaman kedua.

**Case(s) referred to:**
*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***
*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC* ***(refd)***
*Genesis World Sdn Bhd v. Mobikom Sdn Bhd [2003] 7 CLJ 100 HC* ***(refd)***
*Kay Hian Pte Ltd v. Ma Boon Lan [2003] 3 CLJ 722 CA* ***(refd)***
*Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, s. 24
Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d)
Rules of the High Court 1980, O. 18 r. 19

**Other source(s) referred to:**
*Malaysian Court Practice*, 2007 Desk edn, Lexis Nexis, p. 246

*For the appellant - Mohd Fairuz Abdullah; M/s Mohd Najid & Partners*
*For The respondent - Shahrul Faizal Md Ali; M/s Mokhtar Ngah & Co*

*[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: 22NCVC-205-12-2014 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Idrus Harun JCA:**

**[1]** The notice of application filed by the defendant sought to strike out the plaintiff's writ of summons and statement of claim dated 9 December 2014 pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012. The application was premised principally on the defendant's contention that the same issues and claims had already been adjudicated by the High Court *vide* the Originating Summons No. 24-2896-2008 which led consequently to the said originating summons being struck out of which there was no appeal filed by the plaintiff (the first suit). The plaintiff's present action, therefore, is barred by *res judicata*. The High Court dismissed the notice of application on 21 May 2015. We heard the appeal against the decision of the learned judge in dismissing the defendant's application. On 5 May 2016, at the conclusion of the arguments by both learned counsel, we unanimously allowed the appeal. For the ease of reference, parties to this appeal will be referred to as they were in the court below. We shall lay down the summary of some of the material facts first and thereafter consider the merits of, and give our reasons for allowing the appeal.

**[2]** The Government of the State of Johor (the State Authority) had approved the alienation to the plaintiff two pieces of land known as PTD 1057 HS(D) 7586 and PTD 1057A HS(D) 7587 Mukim of Sedili Besar in

the District of Kota Tinggi, Johor having an area of approximately 418 acres and 260 acres respectively (collectively referred to as the said land). It is an irrefutable fact that the said land is a Malay reservation.

**[3]** Pursuant to a lease agreement dated 5 May 1987, in consideration of the sum of RM130,000, the plaintiff leased the said land to Selangka Sdn Bhd for a period of 60 years to be developed into an oil palm plantation (exh. AK1). The lease was approved by the State Authority on 2 March 1988 and subsequently registered as No. 10507/1988 Jilid 9, Folio 54 (exhs. AK3 and AK4). Selangka Sdn Bhd at the material time was wholly owned by Malays.

**[4]** The facts gleaned from the statement of claim revealed that in 2008, the plaintiff had made a search at Suruhanjaya Syarikat Malaysia and they discovered that the defendant was not a Malay holding as the shareholders were not Malays. The plaintiff therefore, averred that the lease was not valid and void by virtue of s. 24 of the Contracts Act 1950. On 24 July 2014, the plaintiff applied to the Land Office, Johor to revoke the lease on like grounds. In August 2014, the land title in respect of the said land was returned by the Land Office to the plaintiff with the lease endorsement thereon cancelled. The plaintiff's solicitors thereupon sent a notice dated 6 October 2014 to the defendant stating that the lease was null and void as it had contravened the law and giving one month to the defendant to vacate the said land and surrender it to the plaintiff.

**[5]** The plaintiff had also alleged that the defendant's solicitors CF Wong & Co had written to the plaintiff on 27 October 2014 notifying them that the subject matter in the notice of 6 October 2014 had already been adjudicated by the High Court in Johor Bahru *vide* the first suit. However, the plaintiff averred that the first suit actually challenged the registration of the defendant's lease and was thus different from the present action.

**[6]** In their present action, the plaintiff sought a declaration that the registration of the lease No. 10507/1988 Jilid 9, Folio 54 lease was void as the shares in Sungai Dinar Sdn Bhd *qua* the defendant were owned by non-Malays and an order that the defendant immediately returned the vacant possession of the said land to the plaintiff. The defendant, it is to be noted, counterclaimed seeking a declaration that the lease was valid in law, the revocation of the lease by the Land Office was null and void and an order directing the Land Office to reregister the lease in respect of the said land.

**[7]** The learned judge correctly stated that the sole issue in this case was whether the plaintiff's action was barred by *res judicata*. Nevertheless, the learned judge held that the cause of action in this case was different from the previous suit. His Lordship explained that in the previous suit, the cause of action was in relation to the registration of the lease at the initial stage of registration whereas the instant action was related to the status of the registration of the lease after the authority had revoked it.

**[8]** The appeal brings to a focus the main and only issue for our determination which is whether the present action is barred by *res judicata*. We would start off by touching on one preliminary point. It is to be remembered that at the outset, we mentioned that the lease agreement was entered into between the plaintiff and Selangka Sdn Bhd. However, this fact was not revealed in the statement of claim. In fact, it was the defendant's statement of defence which put the case in its proper perspective when the defendant explained that initially, the lease agreement was between the plaintiff and Selangka Sdn Bhd and the lease of the said land comprising Lot PTD 1057 and Lot PTD 1057A was registered with Selangka Sdn Bhd as the lessee. On 4 October 1992, Selangka Sdn Bhd had applied to the Land Administrator for the District of Kota Tinggi to transfer the lease in respect of H.S.(D) 7587 PTD 1057A (exh. AK6) to its subsidiary namely the defendant. This application was subsequently approved by the Land Administrator on 25 November 1992 (exhs. AK7, AK8 and MY4). The defendant's submission was that the doctrine of *res judicata* applied to this action solely on the basis that the first suit commenced by the plaintiff was similar to the present action. Learned counsel for the plaintiff quite expectedly, disputed the defendant's claim that the instant action was *res judicata* contending that the cases were two distinctly different suits. To appreciate the contentions that had been raised before this court, it would be desirable to consider both the first suit and the present action mounted by the plaintiff in 2008 and 2014 respectively.

**[9]** We begin by stating that in the first suit the reliefs sought by the plaintiff were, firstly a declaration that the registration of the lease No. 10507/1988 Jilid 9, Folio 54 in respect of the lease of the said land that is H.S.(D)28115, PTD 1057 and H.S.(D)28116, PTD 1057A was void, not valid and of no effect, secondly, the registration of the lease by the third defendant namely the Registrar of Land Title Johor was *ultra vires* and thirdly the third defendant should cancel the endorsement of the lease registration on the land title in respect of the said land.

**[10]** In the present action, it is of some significance to mention that the plaintiff was also seeking a declaration for the same lease registration to be declared void and not valid as the shares in the defendant belonged to non-Malays and an order that the defendant return vacant possession of the land under the title H.S.(D)28116 PTD 1057A to the plaintiff. It would seem clear that the other piece of land under the title H.S.(D)28115, PTD 1057 which was leased to Selangka Sdn Bhd was not included in the present action. It is necessary to mention that both pieces of land were registered under the same lease instrument as mentioned above (exhs. AK7, AK8 and MY4].

**[11]** It is abundantly clear that the causes of action in the first suit and the instant action are the same. We can discern no difference between the two suits even though the land sought to be returned only involved

H.S.(D)28116, PTD 1057A. Both suits undoubtedly sought two identical reliefs resting as they were on the same facts and issues. In the first suit, the defendants by way of a summons-in-chambers applied to strike out the same pursuant to O. 18 r. 19 of the Rules of Court 2012. On 20 November 2009, the High Court allowed the application and dismissed the first suit. The learned judge in the court below failed to consider the fact that the plaintiff did not file an appeal against the decision of the High Court in the first suit. They instead commenced the present action for the same reliefs sought in the first suit.

**[12]** The main bone of contention between counsel in the first suit was whether the defendants were recognised as 'Malay' under the Johore Malay Reservation Enactment 1936. The learned judge who heard the defendant's application to strike out the first suit had duly considered this issue which was fully ventilated before His Lordship. Based on the SSM's company information in respect of the defendant (exh. AK3) the learned judge in the first suit did consider this documentary evidence which showed that the defendant, as the second defendant in the first suit, was 'Malay'. Accordingly, on 20 November 2009, the first suit was dismissed by the learned judge. The plaintiff in the present action once again raised the same issue which had already been adjudicated and decided in the first suit of which the plaintiff, for reasons best known to them, chose not to appeal. The learned judge, in this regard, tried in vain to distinguish the two suits by saying that the first suit was in connection with the issue of the registration of the lease at the initial stage of registration whereas the instant action was related to the status of the registration of the lease after the authority had revoked it. Whatever that explanation means, in our judgment, the fact remains that both cases clearly boiled down to the issue of the status of the defendant, and the reliefs sought by the plaintiff which we find to be identical and that the High Court in the first suit had already made a decision.

**[13]** We would once again emphasise that the plaintiff did not appeal against the High Court's decision in the first suit. Such a failure constitutes a concession that the decision of the learned judge was correct and therefore the plaintiff would be precluded from canvassing the same argument in the second suit. In the case of *Genesis World Sdn Bhd v. Mobikom Sdn Bhd* [2003] 7 CLJ 100; [2003] 4 MLJ 263 it was held:

> The plaintiff's failure to appeal against the striking out of their first suit constituted a concession that the decision of the learned SAR was correct. By not appealing, the plaintiff was now, in fact precluded from canvassing the argument that they were still within the 6 years limitation period. The plaintiff should not be allowed to re-agitate an issue which may only have been available to it had they appealed against the dismissal of the first suit. Should this court hold the converse view, it would encourage litigants to ignore the RHC and act with impunity and so long as the limitation period has yet to run its full course

**[14]** It is trite law and, indeed, a fundamental rule that a matter that has been adjudicated by a competent court ought not to be pursued further by the same parties. It is an irrefutable fact that the first suit was decided by a court of competent jurisdiction. The matter had already been decided on the merits by the competent court and that accordingly it is conclusive between the defendant and the plaintiff as to all matters that were already litigated or that could have been litigated in the first suit. *Res judicata* therefore, applies to the present action as to estop the plaintiff from litigating the same issue. The defendant, being the party asserting *res judicata* had shown that there was a final judgment on the merits and that it was conclusive as the plaintiff did not file any appeal against the High Court's decision. Therefore, the plaintiff ought not to be allowed to file the second suit.

**[15]** This court in *Kay Hian Pte Ltd v. Ma Boon Lan* [2003] 3 CLJ 722; [2003] 4 MLJ 603 said:

> Addressing the second issue first, once a trial judge makes a ruling, whether substantive or procedural, whether final or interlocutory, it must be adhered to and the issue may not be re-opened without cause. The only exception to this is where the court plainly lacked jurisdiction to make the order complained of, and the court in question has not been drawn up and perfected.

**[16]** We would, in this regard, refer to the Supreme Court's decision in the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 wherein the respondent initially filed a motion before the High Court which resulted in due in the dismissal of the same. The respondent subsequently commenced a fresh action against the appellant which in turn filed an application pursuant to O. 18 r. 19 of the Rules of the High Court 1980 to strike out the second action on the ground that it was *res judicata* and an abuse of the process of court. The Supreme Court held as follows:

> (1) The significance of *res judicata* lies in its effect of creating an estoppel *per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> (2) The doctrine of *res judicata* is not confined to causes of action or issue which the court is actually asked to decide or has already decided. It cover also causes of action or issues of facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence, or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow new proceeding to be started in respect of them.

(3) The respondent's case herein represents a classical case for the application of the doctrine *res judicata* by way of cause of action estoppel. The claim for damages in the statement of claim and the claim for damages in the previous originating motion were clearly identical, resting as they were on the same facts and issues. Both claimed damages for the appellant's refusal to allow the respondent to utilise in full the identical loan of RM750,000 which allegedly resulted in the failure of the identical housing scheme.

**[17]** In our judgment, one of the grounds upon which an application under O. 18 r. 19 of the Rules of Court 2012 can be made is provided in para. (1)(b) which states that an action is scandalous, frivolous as vexatious and the most common instance of matters which are struck out on this ground are those which are *res judicata* (see *Malaysian Court Practice*, 2007 Desk edn, Lexis Nexis at p. 246). We are satisfied that the present action is an attempt by the plaintiff to reagitate, regurgitate or otherwise relitigate the same issue which had already been litigated in the first suit and decided by the High Court on 20 November 2009. The plaintiff should have appealed against the said decision. By not appealing, the plaintiff is precluded from canvassing the same argument that the lease was null and void and of no effect. The principle of *res judicata* therefore applies to estop the plaintiff from reagitating and relitigating this issue in the second suit. We therefore, cannot accede to the argument urged for the plaintiff that *res judicata* does not apply to the instant action and that the writ of summons and statement of claim ought not to be dismissed as it should appropriately go to trial.

**[18]** The well-established and trite principle upon which the court acts in exercising its power to strike out pleadings under O. 18 r. 19(1) of the Rules of Court 2012 is that pleadings may be struck out only and only if the court is satisfied that the claim is on the face of it obviously unsustainable. The burden to prove that the case is plain and obvious rests with the appellant. Thus in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 it was emphasised that:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

Similarly, in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293, the Supreme Court held that:

> On an application to strike out a statement of claim under O. 18 r. 19 of the "Rules of the High Court, the right course for the Court to take is to strike out the claim if it is satisfied that the claim does not disclose a reasonable course of action."

**[19]** While the judgment of the learned judge should be accorded the utmost respect, we however find a valid justification for the reasons we have alluded, to disturb His Lordship's decision in exercising his discretion to dismiss the defendant's application. We have indeed considered the circumstances described above in totality and it plainly shows and indeed the defendant has shown to our satisfaction that the plaintiff ought to be estopped by *res judicata* from bringing this action to the court for the second time. We would, in conclusion, hold that this is an obvious and plain case whereby recourse should be had to the summary procedure under O. 18 r. 19(1)(b) of the Rules of Court 2012. Therefore we allow the appeal and set aside the order of the learned judge given on 21 May 2015. In the result, the notice of application dated 12 February 2015 in encl. 8a is allowed in prayer 1 with costs of RM10,000 subject to the payment of allocatur fee.